FILED
OCT 5 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-518

EARL VOGT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

GEORGE T. DAVIS,
JOSEPH C. MOREHEAD,
1522 Vallejo Street,
San Francisco, California 94109,
Telephone: (415) 928-5860,
Attorneys for Petitioner.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

Subject Index

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision and Statute Involved	2
Statement	3
Reasons for Granting the Writ	6
Conclusion	13

Appendices

Appendix A	i
Appendix B	xxvi
Appendix C	xxix

Table of Authorities Cited

Cases	Pages
Brady v. Maryland (1963) 373 U.S. 83	6, 8, 9
Byrd v. Wainwright (5th Cir. 1970) 428 F.2d 1017	7, 11
Clay v. Black (6th Cir. 1973) 479 F.2d 319	9
United States v. Cobb (SDNY 1967) 271 F.Supp. 159	9
United States v. Donaway (9th Cir. 1971) 447 F.2d 940	7
United States v. Echeles (7th Cir. 1965) 352 F.2d 892	7
United States v. Hickok (9th Cir. 1973) 481 F.2d 377	9
United States v. Shuford (4th Cir. 1971) 454 F.2d 772	7
Williams v. Dutton (1968) 400 F.2d 797, 89 CT 908, 393 U.S. 1105	10

Constitutions

United States Constitution, Fifth Amendment	2, 11

Rules

Federal Rules of Criminal Procedure:	
Rule 14	3
Rule 16	3

Statutes

18 U.S.C.:	
Section 371	3
Section 1341	3
Section 1343	3
Section 1962(c)	3
Section 3500	2, 6, 9
28 U.S.C., Section 1254(1)	2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No.

EARL VOGT,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Earl Vogt, petitioner herein, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App.A, infra), is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 26, 1977 (App.B, infra). The Court of Appeals denied petitioner's petition for re-hearing on September 6, 1977 (App.C, infra). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government's failure to provide the petitioner with pre-trial discovery of exculpatory evidence violated the petitioner's right to due process of law.

2. Whether the Trial Court's refusal to grant the petitioner's motion for severance deprived the petitioner of his right to present the exculpatory testimony of his co-defendant to the jury.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property without due process of law * * *

2. 18 U.S.C. 3500 (The Jencks Act) provides in pertinent part:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness or prospective govern-

ment witness (other than the defendant) to an agent of the government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

3. Rule 14 of the Federal Rules of Criminal Procedure provides in pertinent part:

> If it appears that a defendant of the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the Court may order an election of separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires.

STATEMENT

On June 5, 1975 petitioner Earl Vogt and six other named persons were indicted by a Special Federal Grand Jury in San Francisco, California. The petitioner and each of the other co-defendants were charged with multiple violations of 18 U.S.C. 1343 (wire fraud), 18 U.S.C. 1341 (mail fraud), 18 U.S.C. 1962(c) (racketeering) and 18 U.S.C. 371 (conspirracy).

The petitioner Earl Vogt entered a plea of not guilty to each count of the indictment and was set for trial by jury on August 5, 1975. Prior to the date for trial the petitioner and each of the named defendants made a detailed motion for discovery pursuant to Rule 16 of the Federal Rules of Criminal Procedure

(CT 89).[1] The government responded to the petitioner's request for pre-trial disclosure of exculpatory evidence by stating in open Court that such evidence would be disclosed "promptly when and if any such favorable evidence is discovered . . ." (Government's Response, CT 140.)

The trial of the case commenced on August 5, 1977 and continued until September 8, 1977. During the course of the trial counsel for the petitioner inadvertently discovered that one of the co-defendants, Douglas Cassidy, had given a statement to the FBI which was highly exculpatory to the petitioner.[2] (RT Vol. 16, p. 2959.) Although this statement was contained in an FBI 302 report which had been in the possession of the government for some time prior to trial, the government had failed to disclose the statement to defense counsel. The government prosecutor stated that the 302 report was not disclosed to defense counsel because the government doubted the reliability of the information contained in the report. (RT Vol. 16, p. 2960.)

When the petitioner discovered the exculpatory evidence contained in the Cassidy 302 report he immediately sought to ascertain whether or not Cassidy was going to take the witness stand in his own behalf.

---

[1]"CT" designates Clerk's Transcript on appeal in the Ninth Circuit. "RT" designates Reporter's Transcript on appeal in the Ninth Circuit.

[2]Douglas Cassidy occupied the anomolous position of government informer and indicted co-defendant. While Cassidy was employed as a government informer, who penetrated the Eurovest conspiracy at the government's behest, he gave information to the FBI that Earl Vogt was a "victim" rather than a conspirator.

Once the petitioner determined that Cassidy was not going to testify in his own defense, the petitioner made a showing of his intent to call Cassidy as a defense witness. (RT Vol. 17, pp. 3243-3244.) Cassidy's refusal to testify as a defense witness, on Fifth Amendment grounds, deprived petitioner of any opportunity to get Cassidy's exculpatory observations to the jury. The petitioner made detailed motions for severance on two separate occasions, but his motions were denied by the trial judge.[3]

Unable to call Cassidy as a witness, the petitioner attempted to introduce the extrajudicial statements of Cassidy into evidence, but was thwarted by the objections of counsel for Cassidy. (RT p. 3018.) Ultimately the petitioner's counsel managed to get a portion of the exculpatory evidence before the jury by cross-examination of the FBI agent who prepared the report.[4]

The petitioner raised the inter-related issues of the denial of adequate pre-trial discovery and the refusal of his motions to sever in his appeal before the Court of Appeals for the Ninth Circuit. But the Court of Appeals affirmed his conviction on the grounds that he obtained the benefit of the Cassidy testimony through cross-examination of the FBI agents. (App. A, p. xvi.) The Court of Appeals further held

---

[3]In its opinion the Court of Appeals recognized that the petitioner diligently pursued his motion to sever, and that he was clearly intending to call Cassidy as a witness. (App.A, p. xv.)

[4]The Ninth Circuit panel pragmatically recognized that the agent's testimony on cross-examination was "not an adequate substitute for Cassidy's (testimony) . . ." (App.A, p. xvi.)

that the Trial Court properly denied petitioner's motions to sever since the petitioner failed to establish a willingness on the part of Cassidy to testify if a severance were granted. (App.A, p. xvi.)

The Court of Appeals denied petitioner's petition for a rehearing and issued a modified opinion affirming its earlier decision on September 6, 1977. (App.C.)

REASONS FOR GRANTING THE WRIT

This case presents two important and related questions concerning the rights of individual defendants who are joined with other defendants in multiple defendant criminal trials. Initially, this Court should decide whether or not the limitations imposed on pretrial discovery of witness defendants in Federal criminal trials by the so-called Jencks Act (18 U.S.C. §3500) should yield to the constitutional requirement that a criminal defendant be granted meaningful access to any evidence which could tend to establish his innocence. *Brady v. Maryland* (1963) 373 U.S. 83. This is a question which remains unresolved despite a variety of conflicting Circuit Court opinions dealing with possible resolution of the invariable conflict between the Jencks Act and the *Brady* rule.

Secondarily, this case graphically illustrates the potential danger inherent in multiple defendant trials. An individual defendant in such a trial may well be precluded, by Fifth Amendment considerations, from obtaining vital testimony to establish his

innocence from a co-defendant who is a percipient witness and who is unwilling or unable to testify in a consolidated trial. There have been a number of Circuit Court decisions dealing with the right of a defendant to obtain a severance in order to obtain access to the favorable testimony of a co-defendant, but the rule of law relating to the standards to be employed by the Trial Court in determining whether or not to grant the severance is by no means clearly settled.[5]

The decision by the Court of Appeals has left these two complicated issues of law unresolved and only a definitive opinion from this Court can clearly and certainly establish a workable standard for pre-trial discovery of exculpatory evidence and for adequate guidelines to be utilized by Trial Courts in determining the validity of motions to sever criminal trials in order to obtain exculpatory evidence.

The resolution of both these complicated questions is of fundamental importance to the rights of individual defendants and to the overall effectiveness of the criminal justice system.

1. In affirming the conviction of the petitioner-appellant the Court of Appeals for the Ninth Circuit *impliedly* rejected the petitioner's contention that he had been deprived of due process of law by the government's failure to provide pre-trial discovery of

---

[5]See, e.g. *Byrd v. Wainwright* (5th Cir. 1970) 428 F.2d 1017; *United States v. Echeles* (7th Cir. 1965) 352 F.2d 892; *United States v. Shuford* (4th Cir. 1971) 454 F.2d 772; *United States v. Donaway* (9th Cir. 1971) 447 F.2d 940.

exculpatory evidence.[6] The opinion of the Court of Appeals not only ignored the petitioner's contention that he had been denied due process of law, but, by affirming the conviction, placed the stamp of approval upon the government's dilatory response to the defendant's detailed pre-trial discovery request. Thus the government's intentional or negligent failure to provide the defendant with prompt discovery of evidence which could have established his innocence became a fault without a remedy.

A person accused of a crime has an absolute right, based upon due process of law, to obtain access to all evidence in the possession of the prosecution which could establish or tend to establish his innocence. *Brady v. Maryland* (1963) 373 U.S. 83. The United States Government, and its prosecution, have a high duty to insure that justice is done in a criminal trial and that a citizen accused of a crime has every possible opportunity to prove his innocence.

But the *Brady* decision left a basic question unanswered: At what point in time is the prosecution required to disclose exculpatory evidence to the defense? And, when does late disclosure of exculpatory evidence become a denial of due process of law?

---

[6]Curiously enough the opinion of the Court of Appeals completely overlooked the petitioner's argument that the prosecution's delay in providing discovery of exculpatory evidence denied him due process. (App.A.) The petitioner-appellant again raised this crucial issue in a petition for rehearing before the Court of Appeals and again obtained *no* ruling on his argument. (App.C.)

There is an inevitable dichtomy between the broad constitutional mandate of due process articulated in the *Brady* decision and the specific rules for the disclosure of witness statements set forth in the Jencks Act. (18 U.S.C. 3500.) If the prosecution is in the possession of exculpatory evidence which is in the form of statements from witnesses other than the defendant, the prosecution can claim that the general duty of disclosure is regulated by the specific terms of the Jencks Act and that disclosure of witness statements need not occur until after the witness has testified.[7]

This case squarely raises a constitutional question of fundamental importance. How can an accused properly prepare and present an integrated and coherent defense if the government can withhold vital exculpatory evidence until midway through trial? We submit that the answer to this question is that a defendant cannot adequately prepare a defense under such circumstances and the failure of the government to provide full disclosure of *all* exculpatory evidence prior to trial deprives a defendant of due process of law. *Clay v. Black* (6th Cir. 1973) 479 F.2d 319; *United States v. Cobb* (SDNY 1967) 271 F.Supp. 159; *United States v. Hickok* (9th Cir. 1973) 481 F.2d 377.

---

[7]See, generally, 18 U.S.C. 3500(a) providing, in pertinent part, that no statement of a witness need be disclosed to the defense "until such witness has testified on direct examination in the case . . ."

As to whether or not specific evidence is of an exculpatory nature, requiring pre-trial disclosure, a simple remedy would be for the government to disclose the questioned evidence to the trial judge *in camera* to obtain an objective ruling of the question.[8] If this minimal precaution had been exercised in this case it is certain that the trial judge would have ordered the immediate disclosure of the Cassidy statement to the defense. (RT Vol. 16, p. 2960.)

The determination of whether or not specific evidence is of an exculpatory nature is too subjective to leave solely in the hands of a prosecutor who is seeking to prove guilt. Prosecutors, like defense counsel, perceive evidence from an adversarial point of view. The only fair remedy for the type of problem engendered by this case is to either require the prosecution to disclose *all* evidence to the defense prior to trial, or else to have a neutral judge or commissioner review the evidence to determine which evidence is exculpatory prior to trial.

This case was a particularly close one and the petitioner vigorously contended, and still contends, that he was innocent of any wrongdoing. Had the petitioner been able to make full use of the exculpatory Cassidy statement, the outcome of this trial might have been far different.[9]

---

[8]An *in camera* inspection of evidence was suggested in *Williams v. Dutton* (1968) 400 F.2d 797, 89 S.Ct. 908, 393 U.S. 1105.

[9]The petitioner was originally charged with 28 counts of criminal activity. The jury acquitted him of 23 counts. (App.B.)

2. The Court of Appeals recognized that joint trials, while desirable from the viewpoint of judicial economy, do pose certain hardships for individual defendants. (App.A, p. xvii.) But in this case the Court of Appeals upheld the denial of the petitioner's motions to sever on the premise that he had failed to show a "reasonable probability" that Cassidy would testify if severed. (App.A, p. xvi.)

In reaching its decision on the severance questions, the Court of Appeals for the Ninth Circuit followed the three-prong test for severance set forth in *Byrd v. Wainwright* (5th Cir. 1970) 428 F.2d 1017, to wit:

> 1) Whether the defendant actually intended to call his co-defendant as a witness?
>
> 2) Whether the expected testimony of the co-defendant would be exculpatory?
>
> 3) Whether the co-defendant would be likely to testify if served?

The Court of Appeals held that the petitioner met the burden of the first two tests, but failed on the third. (App.A, p. xvi.) It is submitted that the opinion of the Court of Appeals for the Ninth Circuit erred in its decision on this critical point.

The opinion of the Court of Appeals recognized that co-defendant Enis made a sufficient showing of the "willingess on the part of Cassidy to testify on behalf of Enis . . ." (App.A, p. xvi.) If Cassidy chose to testify for Enis he would, in fact, waive his Fifth Amendment right to remain silent. Since there is no recognition at law of a partial Fifth Amendment

waiver, Cassidy would be open to examination by petitioner's counsel once he testified for co-defendant Enis. And since petitioner already knew that Cassidy had given exculpatory evidence to the FBI, he clearly could have obtained this testimony from Cassidy if a severance were granted. There is simply no way by which Cassidy could have given testimony for co-defendant Enis without having also given testimony for the petitioner. Thus, as a matter of logic, since the Enis affidavit was sufficient to establish the reasonable likelihood of Cassidy testifying for Enis in a severed trial it was also sufficient to establish the likelihood that Cassidy would testify for the petitioner in such a severed trial. No other result would have been possible *had* the motions for severance been granted.

In short, the petitioner showed far more than a remote likelihood of obtaining favorable testimony from his co-defendant had a severance been granted. The unique feature of this case was the fact that the co-defendant Cassidy was formerly a government informer and had obtained his evidence at the behest of the government. Testimony for the petitioner coming from such a source might well have provided the necessary corroboration to support the petitioner's contention that he was a victim, rather than a co-conspirator. Even without the Cassidy statement the petitioner came extremely close to obtaining a complete acquittal. Had the statement been in evidence before the jury, the petitioner might well have been acquitted on all counts. For this reason the petitioner was severly harmed by the denial of his motions to sever.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the writ of certiorari should be granted.

GEORGE T. DAVIS,
JOSEPH C. MOREHEAD,
Attorneys for Petitioner.

September 29, 1977.

(Appendices Follow)